

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Acceleration of Broadband Deployment)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

EXHIBIT C
(GMTC and RCC Comments in WT Docket No. 08-165)

TO

**COMMENTS OF THE GREATER METRO TELECOMMUNICATIONS
CONSORTIUM, THE RAINIER COMMUNICATIONS COMMISSION, THE
CITIES OF TACOMA AND SEATTLE, AND KING COUNTY WASHINGTON, AND
THE COLORADO MUNICIPAL LEAGUE**

Kissinger & Fellman, P.C.
Kenneth S. Fellman
3773 Cherry Creek North Drive, Suite 900
Denver, Colorado 80209
Telephone: (303) 320-6100
Facsimile: (303) 327-8601
kfellman@kandf.com

July 18, 2011

In the Matter of

WT Docket No. 08-165

Kissinger & Fellman, P.C.
Kenneth S. Fellman
3773 Cherry Creek North Drive, Suite 900
Denver, Colorado 80209
Telephone: (303) 320-6100
Facsimile: (303) 320-6613
kfellman@kandf.com

Date: September 29, 2008

TABLE OF CONTENTS

Table of Contents	i
Summary	iii
I. Introductory Information About Commenters	2
II. Notice	2
III. Legal Argument	4
A. The plain language of the statute and the legislative intent provide clear and unambiguous direction for state and local governments	4
B. Federal and state courts have consistently interpreted the relevant statutory language in a manner contrary to the Petition’s requests	5
C. When Congress does not dictate a specific timetable, an entity’s “failure to act” must be considered on a case-by-case basis	6
D. Land use decisions are reserved for state and local authorities	9
E. Section 253 does not give the Commission authority to preempt all state and local laws requiring variances before wireless facilities can be permitted	10
F. Granting the Petition will result in preemption of state statutes, in addition to local zoning regulations	11
IV. Factual Information About Addressing Applications for Wireless Communications Facilities by Local Governments	12
A. There is no demonstrated need for a national rule preempting local land use authority	14
B. There are reasonable explanations why some applications take longer than 45 or 75 days to reach decision	15
C. Some applications for local land use approval of wireless communications facilities require compliance with state environmental laws or require the local government to review an applicant’s approval from a federal agency	19
D. A rule preempting local authority will discourage a cooperative working relationship between local governments and the industry	20

E.	Before the Commission imposes federal rules on local governments to spur deployment, it should consider similar requirements on providers to take prompt action to fill in coverage gaps	21
F.	If CTIA is serious about addressing the problems it claims exist in local government communities, it should first be required to work cooperatively with local governments with FCC assistance to address those issues, as it has done successfully in the past	22
V.	Conclusion	23
VI.	Certificate of Service	25

EXHIBITS

Exhibit A	-	GMTC Member Jurisdictions
Exhibit B	-	RCC Member Jurisdictions
Exhibit C	-	Local Governments' Land Use Codes

SUMMARY

These Comments are filed by the Greater Metro Telecommunications Consortium, the Rainier Communications Commission, the Summit County Telecommunications Consortium, and the City of Boulder, Colorado (collectively referred to as the “Local Governments”). The Local Government suggest that the Commission should, in the first instance, require that CTIA provide notice required by Commission rules prior to further consideration of the Petition.

The Local Governments argue that the relief requested by the Petition is beyond the authority granted by Congress. The plain language of Sections 332 and 253 of the Telecommunications Act of 1996, as well as the legislative intent provide clear and unambiguous direction for state and local governments in acting on applications for wireless communications facilities. There is no ambiguity for the Commission to clarify. Moreover, court decisions consistently support the Local Governments’ position. Congress has not dictated a specific timetable for local land use action, and as such, an entity’s “failure to act” must be considered on a case-by-case basis. Case law is clear in holding that land use decisions are reserved for state and local authorities, and Congress preserved that authority in Section 332.

With respect to Section 253, the Telecommunications Act does not give the Commission authority to preempt all state and local laws requiring variances before wireless facilities can be permitted. The interpretation of Section 253 relied upon by CTIA has recently been overturned by the Ninth Circuit Court of Appeals. The Commission likewise has no statutory authority to preempt a wide range of state statutes, which would be necessary before local governments could comply with the federal “shot clock” requirements that CTIA requests.

The Local Governments present specific evidence of their experience in wireless facilities siting, in order to demonstrate that there is no widespread, significant problem with local governments causing barriers to deployment of wireless facilities and the provision of wireless services. Even if the Commission had legal authority to impose national zoning rules on every one of the 38,967 local governments in the United States, there is no evidence to support such a sweeping preemption of local authority. There are reasonable explanations why some applications take longer than 45 or 75 days to reach decision. Often times, the delay is caused by the applicant. Moreover, some applications for approval of wireless communications facilities require compliance with state environmental laws or require the local government to review an applicant’s approval from a federal agency, making it impossible to reach final decision within

45 or 75 days. The proposed rule would result in an inability to comply with existing Federal statutes and regulations relating wetlands and air traffic safety. Rather than speed up the process for deployment, a rule preempting local authority will discourage a cooperative working relationship between local governments and the industry.

The Local Governments conclude by noting CTIA's history of a positive relationship with local governments to address land use issues of mutual concern. If CTIA is serious about addressing the problems it claims exist in local government communities, it should first attempt to work cooperatively with local governments with Commission assistance to address those issues, as it has done successfully in the past.

In the Matter of

WT Docket No. 08-165

1

I. Introductory Information About Commenters

The GMTC is an intergovernmental agency formed pursuant to Colorado law, comprising 34 cities, counties and towns in the metropolitan Denver area. The individual member jurisdictions are listed on Exhibit A. GMTC communities extend from the plains east of Denver to the foothills at the base of the Rocky Mountains. These jurisdictions comprise an area of approximately 645 square miles, and represent a population of approximately 2.3 million people.

The RCC is an intergovernmental agency formed pursuant to Washington law, comprising Pierce County, Washington and 13 cities and towns in Pierce County. The individual member jurisdictions are listed on Exhibit B. Mount Rainier is located in the eastern part of Pierce County. To the west, the County includes the Port of Tacoma, and the Narrows Bridge spanning Puget Sound, connecting County residents on the Washington Peninsula. RCC jurisdictions comprise an area of approximately 1,680 square miles, and represent a population of approximately 805,400 people.

The SCTC is an intergovernmental agency formed pursuant to Colorado law, comprising Summit County, Colorado, and the Towns of Breckenridge, Dillon, Silverthorne and Frisco. Summit County is located in the heart of the Rocky Mountains, approximately 70 miles west of Denver, on the west side of the Continental Divide. With four major ski areas, the SCTC's permanent resident population of approximately 28,000 swells to over 120,000 when one includes part time residents and visitors. SCTC jurisdictions comprise an area of approximately 600 square miles.

The City of Boulder, Colorado is located northwest of Denver, at the base of the Rocky Mountains. Colorado's 11th largest city, Boulder is home to the main campus of the University of Colorado, a growing hi-tech industry, and significant federal laboratories like the National Institute of Standards, the National Oceanic and Atmospheric Administration, and the National Center for Atmospheric Research. It comprises an area of approximately 25 square miles, and has a population of approximately 103,100 people.

II. Notice

As a preliminary procedural matter, the Local Governments suggest that that the Commission cannot consider this matter until CTIA provides the notice required by Note 1 to Commission Rule 1.1206(a). That note requires that when seeking Commission preemption of

state or local regulatory authority, “the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption.” In its Opposition to the Motions for Extension of Time¹, CTIA claims that no such notice is required because it is only seeking a declaratory ruling under Section 332(c)(7)(B), and not a specific request for preemption. Such a claim belies logic and the specific requests of the Petition for at least two reasons.

First, Section VI of the Petition clearly and directly requests preemption of state and local law.² Moreover, the Petition cites unnamed localities in New Hampshire and Vermont, whose ordinances must be preempted, and cites examples of variance procedures under existing local law in Marquette and Waupaca Counties, Wisconsin that should be preempted outright, but only as they apply to wireless providers.³ The Petition extends its preemption demand to all other “similar” ordinances, and as such, notice is required to all entities CTIA claims impose similar requirements. Indeed, validly enacted local laws of these Local Governments may be subject to federal preemption if the Petition is granted, yet CTIA’s refusal to identify the entities it accuses of acting improperly denies these Local Governments the opportunity to assess their risk of preemption by comparing the ordinances of those other communities with their own, and argue what distinctions, if any, apply.

Second, CTIA cannot hide behind a claim that an “interpretation” of an allegedly ambiguous term, which if adopted, would result in federally mandated zoning procedures at the local level, is not in fact a preemption of local law. CTIA refers to numerous unnamed “bad actors” in support of its position. “Interpreting” the alleged ambiguity, as CTIA requests, will absolutely result in preemption because it will render local and state laws invalid, and impose federally imposed land use rules on state and local governments. As noted in Section III.F below, such a mandate may also have the effect of invalidating state statutes that impose environmental review requirements on local land use procedures.

The Commission cannot be assured of a complete and accurate record unless it *requires* CTIA to provide notice to the local governments it has vaguely referred to in support of its Petition.

¹ Opposition to Motions for Extension of Time, WT Docket 08-165, August 26, 2008.

² See, Petition for Declaratory Ruling at 35 - 37.

³ *Id.*, at 36.

III. Legal Argument

A. **The plain language of the statute and the legislative intent provide clear and unambiguous direction for state and local governments.**

Congress intended to preserve the authority of individual state and local governments to consider wireless siting requests. 47 U.S.C. Sec. 332 (c)(7)(B)(ii) states

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

By including the phrase “taking into account the nature and scope of such request,” Congress has addressed the primary issue in the CTIA Petition. Both the plain language of the statute and the legislative intent provide clear and unambiguous guidelines for state and local governments.

When interpreting the plain language of a statute, courts follow the “cardinal rule that a statute is to be read as a whole.”⁴ The meaning of the statutory language depends on the context when read in its entirety.⁵ Here, the plain language of 47 U.S.C. §332(c)(7)(B)(ii), when read as a whole, authorizes and arguably requires state and local governments to consider each request individually. “[T]aking into account the nature and scope of such a request” clearly indicates the intent to consider applications on a case-by-case basis.

CTIA notes that the Commission was created “to make available, so far as possible . . . a rapid, efficient, Nation-wide . . . radio communication service with adequate facilities . . .”⁶ However even this language, when the statute is interpreted as a whole, limits the FCC’s reach to “so far as possible.”⁷

The Telecommunications Act (the “Act”) also states, “nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions

⁴ *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991) (citing *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)).

⁵ *Id.*, citing *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 26 (1988).

⁶ Petition for Declaratory Ruling at 3, citing 47 U.S.C. § 151 (2007).

⁷ *Id.*

regarding the placement, construction, and modification of personal wireless service facilities.”⁸ The House Conference Report directly addressed this issue by noting,

“[u]nder subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. *It is not the intent of this provision* to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.”⁹

Congress recognized that land use decisions are inherently local, and there are different procedures in different jurisdictions. This was the reason it referred to variances *or* public hearings *or* comment processes. Despite Congressional intent recognizing that at times local variances will be requested and considered, CTIA argues that the FCC should preempt all state and local regulations that require wireless siting applications to proceed through a variance processes.¹⁰ This is exactly the preferential treatment Congress sought to avoid.

Even if the Congressional intent to respect state and local land use authority in connection with wireless siting applications was not clear from the plain language of the statute, it is clear that the imposition of federally mandated time frames to act on applications was considered and rejected by the House.¹¹ The Commission’s imposition of strict deadlines for state and local land use decisions would be contrary to both the plain language and the legislative intent of the Act.

B. Federal and state courts have consistently interpreted the relevant statutory language in a manner contrary to the Petition’s requests.

Multiple courts have interpreted the relevant statutory language similarly, holding that state and local governments retain authority and discretion over the process of wireless siting applications. For example, in Minnesota, a state appellate court noted that Congress intended to give municipalities “latitude in exercising their police powers in zoning decisions regarding

⁸ 47 U.S.C. § 332(c)(7)

⁹ H.R. Conf. Rep. No. 104-458, at 208 (1996) (*emphasis added*).

¹⁰ See, Petition for Declaratory Ruling at 41.

¹¹ H.R. Conf. Rep. No. 104-458, at 208 (1996), *supra*.

telecommunications towers.”¹² The court held that “under the Telecommunications Act, state law determines what is a reasonable period of time to act on applications to build telecommunications towers.”¹³

In one of the first federal cases interpreting Section 332, it was determined that a six month moratorium on the issuance of special use permits for wireless facilities did not constitute an unreasonable delay in violation of the Act.¹⁴ “There is nothing to suggest that Congress, by requiring action ‘within a reasonable period of time,’ intended to force local government procedures onto a rigid timetable where the circumstances call for study, deliberation, and decision-making among competing applicants.”¹⁵ “To hold otherwise would afford telecommunications applicants the ‘preferential treatment’ that Congress sought to avoid.”¹⁶

In Rhode Island, the court found that the applicant complained about “a lack of preferential treatment to which Congress has said that it is not entitled” after a fifteen month delay by the city’s review board.¹⁷ “[B]y requiring action within a reasonable period of time, Congress did not intend to create arbitrary time tables that force local authorities to make hasty and ill-considered decisions.”¹⁸

Courts have consistently held that the plain language of the statute provides state and local authorities with the power to decide how wireless siting requests are processed. An FCC “interpretation” is unnecessary and, if the Petition is granted, would be contrary to this existing case law.

C. When Congress does not dictate a specific timetable, an entity’s “failure to act” must be considered on a case-by-case basis.

Congress provided a judicial remedy for “any person adversely affected by any final action or *failure to act* by a State or local government...”¹⁹ The statute contains no timetable defining what constitutes a “failure to act.” What constitutes a failure to act and final agency action have been clearly defined by case law. It is well settled that unless Congress provides

¹² *American Tower, L.P. v. City of Grant*, 621 N.W.2d 37, 40 (Minn App. 2000), citing *Omnipoint Communications, Inc. v. Foster Township*, 46 F.Supp.2d 396, 401 (M.D.Pa. 1999).

¹³ *Id.*

¹⁴ *Sprint Spectrum, L.P. v. City of Medina*, 924 F.Supp. 1036 (W.D.Wash. 1996).

¹⁵ *Id.* at 1040.

¹⁶ *Id.*

¹⁷ *SNET Cellular, Inc. v. Angell*, 99 F.Supp.2d 190, 199 (D.R.I. 2000).

¹⁸ *Id.* at 198.

¹⁹ 47 U.S.C. Sec. 332 (c)(7)(B)(v).

deadlines, an agency's failure to act is evaluated on a case-by-case basis.²⁰ The Commission should reject CTIA's request to act contrary to established law.

The House conference agreement described "final action" as "final administrative action at the State or local government level so that a party can commence action . . . rather than waiting for the exhaustion of any independent State court remedy otherwise required."²¹ Generally, an agency's failure to act can become a "final" agency action, and considered ripe for review, if the agency affirmatively rejects a proposed course of action, delays unreasonably in responding to a request for action, or delays in responding until the requested action would be ineffective.²² When there is a clear statutory duty, but an absence of a statutory deadline, agency delay must be *egregious* before it will be considered "final" action reviewable under the Administrative Procedure Act, or warrant mandamus.²³

In *MCI Telecommunications Corp. v. F.C.C.*, a number of parties asked the court to impose specific timetables to act upon the Commission, after it had not acted for over nine years on an AT&T tariff revision. The court did not impose a specific deadline, and noted that it must apply a "rule of reason" as to "how long the FCC may take between the filing of tariff revisions and its final decision."²⁴ Even after such an extended delay, the court recognized that "[r]atemaking theories may change; new information may become relevant; one proceeding may have to take account of another," and refused to apply a specific timeline to the FCC's process.²⁵

A petition similar to CTIA's seeking local land use preemption was filed in the Commission's Digital Television proceeding Fifth Report and Order in MM Docket No. 87-268.²⁶ It requested that the Commission impose specific time limits upon applications for broadcast transmission facilities. The Commission treated the Petition as one filed pursuant to 47 C.F.R. § 1.401 seeking the institution of a rule making proceeding.²⁷ The proposed rule " . . . would require action within 21 days with respect to requests to modify existing broadcast

²⁰ *Judicial Watch, Inc. v. National Energy Policy Development Group*, 219 F.Supp.2d 20, 38 (D.D.C. 2002) citing *Industrial Safety Equipment v. EPA*, 837 F.2d 1115, 1118 (D.C. Cir. 1988).

²¹ H.R. Conf. Rep. No. 104-458, at 209 (1996).

²² 2 Am. Jur. 2d Administrative Law § 461 (citing *Gordon v. Norton*, 322 F.3d 1213 (10th Cir. 2003)).

²³ *Id.* (citing *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607 (7th Cir. 2003)).

²⁴ *MCI Telecommunications Corp. v. F.C.C.*, 627 F.2d 322, 340 (C.A.D.C. 1980).

²⁵ *Id.*

²⁶ FCC 97-116 (April 22, 1997) ("Fifth Report and Order"), 62 F.R. 26996 (May 16, 1997).

²⁷ *In the Matter of Preemption of State and Local Zoning and Land Use Restriction on the Siting, Placement and Construction of Broadcast Station Transmission Facilities*, 12 FCC Rcd. 12504.

transmission facilities . . . , 30 days with respect to requests to relocate existing broadcast transmission facilities . . . , and [a]ll other requests would have to be acted upon within 45 days.”²⁸ The petitioners sought specific, Commission-imposed deadlines to local action in order to clarify what constituted a failure to act. During the discussion of the issues raised in the Notice of Proposed Rulemaking, the Commission stated, “we are sensitive to the rights of states and localities to protect the legitimate interests of their citizens and we do not seek to unnecessarily infringe these rights.”²⁹ Ultimately, the petition was withdrawn before a final ruling was made. The Commission should exhibit similar sensitivity to state and local authority to act on a case-by-case basis here.

CTIA relies on *Alliance for Community Media vs. F.C.C.*, where the court held that under the *Chevron* test, the language of the Communications Act was ambiguous, and supported Commission rulemaking to determine a specific time in which competitive franchise applications must be acted upon.³⁰ Under *Chevron*, the court first asks whether Congress has spoken directly to the issue.³¹ If not, then deference is given to the agency’s interpretation of the language.³² In *Alliance for Community Media*, the court of appeals held that the Commission has broad authority to interpret the Communications Act even when Congress does not explicitly grant such authority. CTIA’s reliance on *Alliance for Community Media* is misplaced. First, no other courts have followed the same line of reasoning and interpreted the Act so broadly. Second, a petition for rehearing on the decision is pending. Third, and most importantly, the facts here are distinguishable because there is no ambiguity in the statute. Congress clearly indicated that state and local authority to make land use decisions in accordance with state and locally adopted procedures is not affected by the Act.

As the Local Governments describe in Section IV below, no two state or local authorities are alike; therefore, no one timeline fits all local abilities and all local needs in processing land use applications. Congress intentionally left that authority and discretion to the state and local decision makers. These entities take varying amounts of time, depending upon the circumstances of each case, to act in accordance with state and local law to protect the interests

²⁸ *Id.* at 12506.

²⁹ *Id.* at 12510.

³⁰ *Alliance for Community Media v. F.C.C.*, 529 F.3d 763 (6th Cir. 2008); 47 U.S.C. § 541(a)(1).

³¹ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

³² *Id.*

of all parties impacted by land use applications. An FCC-imposed timeline and a definition of a “failure to act” will only frustrate the process and be contrary to the will of Congress.

D. Land use decisions are reserved for state and local authorities.

State and local authorities retain control and regulatory authority over land use regulation concerning the siting of wireless communications facilities. The Act requires only that their decisions be supported by substantial evidence and in writing.³³

Principles of federalism require that the Commission respect the longstanding and foundational authority that state and local governments have in connection with the regulation of local land uses. When the Fourth Circuit evaluated the constitutionality of the Act, it found that “[t]o suggest that a local governmental body withdraw from land-use regulation and leave the construction of structures in the community to the whims of the market is nothing short of suggesting that it end its existence in one of its most vital aspects.”³⁴ Noting the parameters of Section 332, the Court stated “[t]he deliberate choice that Congress made not to preempt, but to use, state legislative processes for siting towers precludes the federal government from instructing the states on *how* to use their processes for this purpose.”³⁵ Recognizing the balance struck by Congress in this area, and in particular, the need to maintain public accountability for land use decisions, the Court held “in the area of regulating the location of communications facilities, Congress was understandably reluctant to assert its preemption rights to deprive state and local governments of their important zoning and permit authority. It recognized that erecting telecommunications towers is of significant local interest . . . Moreover, preserving local legislative processes would make local officials accountable for land use decisions.”³⁶

The Commission should take careful note of the fact that when drafting the Act, the House considered forming an FCC rulemaking committee that would develop a uniform national policy for the development of wireless communication towers.³⁷ However, the committee rejected the preemption of local land use authority.³⁸ Section 704 of the Act was created to prevent the FCC from preempting “local and State land use decisions” and to preserve “the

³³ See 47 U.S.C. § 332(c)(7)(B)(iii).

³⁴ *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688, 702 (4th Cir. 2000).

³⁵ *Id.* at 704 (*emphasis added*).

³⁶ *Id.* at 705.

³⁷ See H.R. Conf. Rep. No. 104-458, at 207-209 (1996).

³⁸ *Id.*

authority of State and local governments over zoning and land use matters.”³⁹ The House specifically identified judicial relief as the “exclusive” mechanism for evaluating zoning decisions, not FCC oversight.⁴⁰

The Commission itself has recognized in the past, and according to its most current web site information, continues to recognize, that Congress intended to preserve local authority to make land use decision on wireless siting applications. The Commission’s position, as represented publicly on its web site, notes:

Section 332(c)(7) of the Communications Act preserves state and local authority over zoning and land use decisions for personal wireless service facilities, but sets forth specific limitations on that authority. Specifically, a state or local government may not unreasonably discriminate among providers of functionally equivalent services, may not regulate in a manner that prohibits or has the effect of prohibiting the provision of personal wireless services, must act on applications within a reasonable period of time, and must make any denial of an application in writing supported by substantial evidence in a written record. The statute also preempts local decisions premised directly or indirectly on the environmental effects of radio frequency (RF) emissions, assuming that the provider is in compliance with the Commission's RF rules.

Allegations that a state or local government has acted inconsistently with Section 332(c)(7) are to be resolved exclusively by the courts (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission). Thus, other than RF emissions cases, the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation.⁴¹

E. Section 253 does not give the Commission authority to preempt all state and local laws requiring variances before wireless facilities can be permitted.

CTIA also claims that its proposed relief is supported by Section 253 of the Act, and argues that Section 253(a) “preempts ‘any state or local statute or regulation, or other state or local legal requirement’ that ‘may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,’ including wireless services.”⁴² CTIA argues that Section 253 is ambiguous and that the FCC must “address this ambiguity” by preempting any law that requires a variance for all wireless communications

³⁹ *Id.* at 207-208.

⁴⁰ *Id.* at 208.

⁴¹ <http://wireless.fcc.gov/siting/local-state-gov.html>.

⁴² Petition for Declaratory Ruling at 35 (*citing* 47 U.S.C. § 253(a)).

facilities.⁴³ CTIA's position rests in large part, on the 9th Circuit's 2006 decision in *Sprint Telephony PCS v. County of San Diego*,⁴⁴ which in turn, relied on the 9th Circuit's earlier decision in *City of Auburn v. Qwest Corp.*⁴⁵ However, that part of the case relied upon by CTIA, and indeed, the primary interpretation of what it means to have the effect of prohibiting service as set forth in *Auburn* has been overruled by the recent *en banc* decision of the 9th Circuit in the *San Diego* case.⁴⁶ There is no longer a significant judicial disagreement over what constitutes a prohibition to the provision of service as alleged in CTIA's Petition,⁴⁷ and no interpretation from the Commission is required.

Even if Section 253 could be read to support the possible preemption of local zoning authority preserved by Section 332, the Commission has previously determined that it will not look favorably on requests for preemption unless the record contains "credible and probative evidence" that the challenged requirement has the effect of prohibiting service.⁴⁸ The Petition is devoid of any credible or probative evidence that would support a Section 253 preemption of traditional local land use authority, and should be dismissed.

F. Granting the Petition will result in preemption of state statutes, in addition to local zoning regulations.

Some state environmental laws require a case-by-case investigation into the impact of individual land use proposals relating to wireless facilities. In New York, a court held that when state law required a Draft Environmental Impact Statement, the Town of Canaan was justified in taking approximately nine months to evaluate a proposed tower siting application.⁴⁹ Based on the complex technical information involved, the court found the time taken for consideration to be reasonable.⁵⁰ In the end, the time it takes for a local government and an applicant to complete environmental review required by a state statute cannot be precluded because of the Act.⁵¹

⁴³ *Id.* at 37-38.

⁴⁴ 490 F.3d 700, 716 (9th Cir. 2006).

⁴⁵ 260 F.3d 1160, 1175-76 (9th Cir. 2001).

⁴⁶ *Sprint Telephony PCS, L.P. v. County of San Diego*, 2008 U.S. App. LEXIS 19316 (September 1, 2008).

⁴⁷ Petition for Declaratory Ruling at 37, n. 94.

⁴⁸ *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, at ¶ 101 (Sept. 19, 1997).

⁴⁹ *See, Nextel Partners of Upstate New York, Inc. v. Town of Canaan*, 62 F Supp.2d 691 (N.D.N.Y. 1999).

⁵⁰ *Id.*

⁵¹ *See New York SMSA Ltd. Partnership v. Town of Riverhead Town Bd.*, 118 F.Supp.2d 333, 341 (E.D.N.Y. 2000).

The State of Washington requires consideration of environmental matters when making decisions about local government actions.⁵² The Washington Administrative Code (WAC 197-11), State Environmental Policy Act (“SEPA”) requires the state’s local governments to conduct an environmental review on all non-exempt actions. Consideration of actions that are not exempt from SEPA, such as new facilities in excess of 60 feet in height or facilities proposed in critical areas,⁵³ require time to notify, review, issue, receive comments and allow the appeal period to expire, which in turn would cause localities to exceed the shot clock proposed by CTIA. The SEPA process alone typically takes 60 days or more, especially when an applicant does not timely provide all required information.

Granting the relief requested by CTIA will result in an effective preemption of any state statute that requires such an environmental review in connection with a local land use application, which review would cause the locality to be unable to act within the mandated time periods. Pursuant to Note 1 to Commission Rule 1.1206(a), the Commission cannot proceed until CTIA identifies each such state statute affected, and notifies each of the Attorneys General in those states to advise of the Petition, and the fact that should it be granted, it will become impossible to comply with these state laws.

IV. Factual Information About Addressing Applications for Wireless Communications Facilities by Local Governments

To the extent that the Commission disagrees with the legal argument asserting its lack of authority to grant the relief requested by CTIA, it is critical that the Commission obtain comprehensive, verifiable information from across the nation about the current environment related to land use applications for wireless communications facilities. The following chart generally describes the Local Governments’ regulatory framework for processing these applications. The chart is a summary, and it should be noted that the processes within each category are not exactly the same within each jurisdiction. In some jurisdictions facilities are permitted as a use by right in certain zoning districts, while the same facilities might require a conditional use permit granted after public hearing in others. Local regulations reflect the goals and needs of the individual community. The chart is followed by a discussion of the issues that have arisen in the approval process by a number of the Local Governments and other information

⁵² See generally, Washington State Environmental Policy Act (SEPA), RCW 43.21C.120.

⁵³ See WAC 197-11-810 25 (a) (iii) and (c).

relevant to the Commission's consideration.

Jurisdiction	No. of wireless siting applications (2006 to 8/2008)	Administrative approval for collocations	Public hearings required for new facility construction	Ave. time for action on collocation applications	Ave. time for action on new facility applications
Adams County, CO	18	Yes	Yes Permitted as conditional use.	1-3 weeks	70-90 days
Arvada, CO	9	Yes	Yes Permitted as conditional use	1-2 weeks	5-6 months or longer if significant neighborhood opposition
Boulder, CO	6	Yes	Yes	2 weeks	1-3 months
Breckenridge, CO	0	Yes	Yes	2 weeks	2-5 months, depending upon other items pending and available staff time
Brighton, CO	4	Yes	Yes Permitted as conditional use.	2 weeks if application is complete	10-12 weeks
Centennial, CO	19	Yes	In most cases, yes, unless permitted as a use in a particular planned unit development.	1 week	75 days
Cherry Hills Village, CO	4	Yes	Yes	2 months	3 months
Denver, CO	175	Yes	Yes, but only in cases where the facility did not meet certain code requirements.	30 days	60-90 days, depending upon need for public hearing
Dillon, CO	0	No	No	2 months	4 months
Edgewater, CO	0	No	Yes		
Englewood, CO	1	Yes	Yes	10-20 days	30-60 days
Federal Heights, CO	1	Yes	Yes, before Board of Adjustment; not City Council.	7-30 days	30-45 days
Frisco, CO	1	Yes	Yes	10-15 days	45-60 days
Glendale, CO	0	Yes	Yes	1-3 weeks	6 - 9 months
Jefferson County, CO	57	Yes	Yes, if not located in area zoned for wireless facilities, or if it does not meet established design standards.	20-30 days	100 days
Lakewood, CO	27	Yes	Yes, in residential zones and on City owned property	2-3 months	4-5 months
Louisville, CO	3	Yes	Yes	60 days	120 days
Thornton, CO	11	Yes	Yes	2-8 weeks	8-14 weeks
Westminster, CO	8	Yes, although neighborhood contact is also required.	Yes	2-6 weeks	
Wheat Ridge, CO	3	Yes	Yes	4-6 weeks	4-5 months
Bonney Lake, WA	0	Yes	Yes	10-15 days	30-120 days
DuPont, WA	0	Yes	Yes	4 months (includes state requirement for environmental decision.	6 months
Fife, WA	0	Yes	Yes	1 month	6 months
Pierce County, WA	60	Yes	Yes	3-12 weeks	6-8 months
Steilacoom, WA	0	Yes	Yes	30-45 days	60-120 days
University Place, WA	5	Yes	Yes	3-4 months	6-7 months

A. There is no demonstrated need for a national rule preempting local land use authority.

In the vast majority of cases, final action by these Local Governments occurs within a relatively short and eminently reasonable period of time. CTIA and other commenters supporting its request will no doubt argue since a large number of these applications are currently addressed within the time period it requests, there should be no objection to the requested rule. Alternatively, it will be argued that if 45 and 75 day deadlines do not provide sufficient time to act, local governments should have no objection to some longer, and arguably more “reasonable,” federally imposed deadline. Notwithstanding these or similar arguments, the Commission must conclude that *any* federally imposed rule on all local governments is outside of its jurisdiction, not authorized by Congress, and not necessary to address the limited number of problems that may arise from time to time.

Regulation of land uses within communities has traditionally been controlled by local government.⁵⁴ According to the U.S. Census Bureau, there are 38,967 units of local governments (counties, municipalities, towns and townships) in the United States.⁵⁵ If the Commission did have jurisdiction (and the Local Governments submit it does not), before it should even consider a one size fits all federal rule preempting land use authority in each of these governmental entities, it must be convinced, based upon its evidentiary record, that there is a wide spread, significant national problem. The evidence from these Local Governments demonstrates just the opposite.

Many jurisdictions specifically provide for administrative approvals for collocation requests and attachments for facilities on existing building structures. These are processes that do not require public hearings prior to approval. The chart demonstrates no collocation request problems in the Local Governments. Arvada, Colorado reports that its administrative review process takes very little time – comparable to a sign or fence permit. Other jurisdictions also report similar swift turnaround times for applications qualifying for administrative approval.⁵⁶

⁵⁴ *Solid Waste Agency of N. Cook County v. U.S. Army Corp of Eng'rs, et al.*, 531 U.S. 159, 174 (2000) citing *Hess v. Port Auth. of Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994); see also, *Nottoway County, supra.*, at 703, citing *Gardner v. City of Baltimore*, 969 F.2d 63, 67 (4th Cir. 1992) (“land-use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live or work in a community”).

⁵⁵ http://www.census.gov/govs/www/02PubUsedoc_GovOrg.html#GP_Govs

⁵⁶ Generally, 1-3 week time period for decisions reported in Adams County, Boulder, Breckenridge, Brighton, Centennial, Denver, Englewood, Frisco, Glendale, and Jefferson County, Colorado; Bonney Lake, Washington.

The time needed to reach a final decision when public hearings are required is, in many cases, comparable to the time taken to act upon most applications for rezonings, conditional use permits or other development-related permits for a property.⁵⁷ In some communities, the time to complete public hearings on new wireless facility applications is less than the average time to consider other land use matters at public hearing.⁵⁸ Louisville, Colorado reports that even when public hearings are required, final action is usually taken within 120 days, while depending upon the size of a project, annexations and other land use development plans can take between 3 and 12 months.

B. There are reasonable explanations why some applications take longer than 45 or 75 days to reach decision.

When applications take longer than 45 or 75 days to reach final decision, there are usually good reasons – some related to the regular local government process, and others related to specific actions or failures to act by the applicant. In some communities,⁵⁹ local zoning codes require applicants and local government staff to conduct one or more neighborhood meetings, prior to an application moving forward. These meetings provide applicants with a clearer understanding of neighborhood concerns, and an opportunity to adjust their applications to address those concerns. Often times, this input results in an improved plan and aids the project's ability to be well-received. Adjustments in applications are considered by local government staff, and there may be suggestions provided to the applicant for additional information in response. This review cycle is a necessary element of working an application into final format so that it is ready for consideration and decision by planning commissions and elected governing bodies. Regardless of whether neighborhood meetings are required, many land use applications (for all structures, not only wireless) follow a review process with local government staff, to address the concept plan and any technical issues requiring consideration. It is not uncommon for some applications to need two or three reviews to address feedback from staff and modify the

⁵⁷ Similar time for public hearings for wireless, as well as other land use applications such as rezoning, preliminary or final plats, and variances, as reported by Adams County, Arvada, Brighton, Centennial, Dillon, Frisco, Glendale, Jefferson County, and Westminster, Colorado; Bonney Lake, DuPont, Pierce County (for conditional use permits), Steilacoom, and University Place, Washington.

⁵⁸ Cherry Hills Village, Englewood, Lakewood, Louisville, Thornton, and Wheat Ridge, Colorado; Pierce County, Washington (for plat approval or variances).

⁵⁹ Arvada, Lakewood and Westminster, Colorado for example.

application to a point where the plan meets a local jurisdiction's design standards and other local code requirements.

Pierce County has community Advisory Commissions that are charged with implementing their respective Community Plans. These Advisory Commissions consider applications and make recommendations to a Hearing Examiner who is vested with authority to make a final decision. It is not always possible to complete these local reviews, submit recommendations and complete a Hearing Examiner proceeding within 75 days. A federal rule imposing a "deemed granted" result if an application is not acted upon within 75 days will significantly affect the public involvement process in these Local Governments and many others throughout the nation. It will put the rights of wireless facilities applicants above the rights of local communities and local plan regulations. Granting the CTIA Petition will either be the end of neighborhood input into these land use decisions, or alternatively, may create a rash of applications being denied for no other reason than the federal rule requiring final action does not provide sufficient opportunity for public participation.

Local land use codes, home rule charters, and state statutes contain requirements for notification and posting in connection with many land use applications. A list of citations to many of the Local Governments' land use codes is attached as Exhibit C. Generally speaking, communities will not schedule a matter for public hearing until an application is considered complete in accordance with local code requirements. While not a frequent occurrence, it is not uncommon for a public hearing on a land use matter to be scheduled, and on the date of the hearing the governing body must postpone to a later date because of some defect in the legally required notice or posting. Under the federal rule CTIA is requesting, an applicant's technical error in notice or posting will result in the governing body denying the application, as opposed to continuing it to a later date, if the later date would extend beyond the Commission's deadline.

Further, some communities have planning commissions and elected bodies (city councils, boards of county commissioners, town councils and/or trustees, etc.) that only meet once or twice per month.⁶⁰ Depending upon when an application is filed, when all information required by local code is received, or when notice is posted and letters of notification are sent to adjacent property owners, it may be impossible to bring the matter before planning commissions and elected bodies in time to receive a final decision within 75 days.

⁶⁰ Columbine Valley, Dacono, Edgewater, Erie and Frederick Colorado are examples of such small communities.

Even in communities where commissions and councils meet more frequently, simply receiving feedback on applications from outside entities legally entitled to review and comment (for example, utility companies) takes 30 days. Louisville, Colorado reports that in the best of circumstances (i.e., no controversy, no other major items on the agenda), it may take an additional 45 days to schedule a Planning Commission and City Council hearing after all reviewer comments are received. In communities that have experienced significant residential and commercial development, while at the same time managing an extremely lean city budget, it simply takes more time to get to the actual hearing. Lakewood, Colorado is one such community. Due to staff constraints and the press of other business, after neighborhood meeting and internal staff review, it can take six additional weeks to get to the Planning Commission hearing.⁶¹ Glendale, Colorado is a small, dense community of approximately 355 acres and over twenty buildings exceeding five stories in height. It has numerous facilities mounted on buildings, excellent wireless coverage, and no applications for new facilities over the last three years. Any application for a freestanding facility would require two hearings before Planning Commission and two hearings before City Council – just as would an application for any other kind of freestanding structure. These applications could not be processed, public notice given, and heard within 75 days, and it would be inherently unreasonable to impose a federal rule mandating special treatment for wireless facilities over other structures of similar height and visibility.

In the experience of these Local Governments, the most common reasons for “delay” results from actions or failures to act on the part of the applicants. Arvada has experienced applicants that significantly delay their own applications by failing to timely return their design changes to the City. Arvada and Westminster have experienced providers who begin the approval process, only to request that applications be put on hold while a provider’s efforts are focused on higher priority sites in neighboring jurisdictions. There have been a variety of other market conditions that have led to an applicant asking that its application be put on hold in these Local Governments.

For applications that do not qualify for administrative approval, University Place, Washington describes its approval process as covering three “phases” – Phase I is application and initial review, and usually takes 30 days. Phase II involves an applicant’s response to

⁶¹ Planning Commission makes the final decision in Lakewood.

comments and questions posed by staff, and can require completion of required studies. Phase III, final review, includes final staff review, hearing and decision. Delays are most often experienced in Phase II, when an applicant delays in providing the required responses to City staff.

Adams County, Colorado reports that depending upon the specific property being developed for a wireless facility, there may be drainage impacts from construction that will impact offsite properties, which requires a drainage plan to be approved by the Public Works Department. The County has experienced some delay in cases where an applicant did not proceed timely to obtain an approved drainage plan. In 2006 Thornton, Colorado received an application from Stryker Site Services on behalf of T-Mobile, for administrative approval that required issues be addressed related to parking, as well as other technical issues related to the facility. The matter took 27 weeks to reach decision – during which time the applicant had the application in its possession before submitting it back to the City for 22 of those weeks. Denver, Colorado has reported a delay caused by an applicant's need to negotiate additional items with the owner of the property upon which the facility was to be constructed. It should be clear that there are a variety of issues, each based upon individual circumstances, where factors unrelated to a local government's action or failure to act cause an inability to reach final decision at a date certain.

It is simply inappropriate to impose a “deemed granted” remedy for applications not acted upon within 45 or 75 days. Especially for new freestanding facilities, 75 days is not sufficient to allow for neighborhood meetings, staff review and comment, and depending upon the jurisdiction, public hearings before a hearing examiner, planning commission and/or the elected governing body of the jurisdiction.

C. Some applications for local land use approval of wireless communications facilities require compliance with state environmental laws or require the local government to review an applicant's approval from a federal agency.

As noted above,⁶² there are state mandated environmental review processes that are required when considering applications for wireless facilities. The Local Governments from Washington cannot comply with the requirements of state law⁶³ and consistently meet a 75 day final decision deadline. The time frame to review environmental clearance under SEPA generally takes between 60 and 120 days. Fife, Washington reports that for new tower applications, the matter would be heard as a conditional use permit application, and the conditional use hearing cannot take place until after SEPA clearance is completed. Pierce County notes that SEPA determinations cannot be issued until all critical area studies have been completed. Even in cases where public hearings are not required, building permits cannot be issued until SEPA clearance has been granted. An FCC rule that results in an inability to comply with state environmental laws will result in construction of towers and other wireless facilities that violate local critical area regulations, causing negative impacts on wetlands, shorelines, steep slopes and their associated buffers. Alternatively, if the Commission imposes the shot clock on local action and does not specifically preempt these state laws, local jurisdictions may simply summarily deny applications if the federal shot clock does not provide sufficient time to comply with state requirements.

Comments in this proceeding filed by the Lee County, Florida Port Authority⁶⁴ describe the negative impact that the proposed rule will have on requirements for compliance with federal regulations. Structures near airports need to be reviewed by the Federal Aviation Administration.⁶⁵

When wetlands are impacted by an application, there will, in many cases, be a requirement to obtain a permit from the Army Corp of Engineers prior to any land use approval being granted by a local government.⁶⁶ In the experience of these Local Governments, the Army Corp of Engineers rarely acts within 75 days. Therefore, the result of a Commission shot clock rule will likely be automatic denial of applications involving wetlands, as it will be impossible to

⁶² See *supra*, Section III F.

⁶³ See *supra*, notes 49 and 50a.

⁶⁴ Comments of Lee County, Florida Port Authority, WT Docket No. 08-165, September 9, 2008.

⁶⁵ 14 C.F.R. Pt. 77, SFAR No. 98 (2008), "Objects Affecting Navigable Airspace."

⁶⁶ 33 C.F.R., Pts. 320-332; 33 C.F.R Pt. 323.

obtain required review from one federal agency within the timelines for required action imposed by another federal agency.

D. A rule preempting local authority will discourage a cooperative working relationship between local governments and the industry.

In many cases, local governments have taken affirmative steps to work together with the wireless industry, seeking input and making code modifications, based upon industry suggestions. Cherry Hills Village, Denver, Dillon and Jefferson County, Colorado, as well as other jurisdictions across the country have worked with wireless industry representatives in this manner. The Denver City Council formed an ad hoc Telecommunications Group in 2006 to update the City code to make it more responsive to both the community's and the wireless industry's needs. Representatives from Cingular (now AT&T), Sprint, Verizon, T-Mobile, and Qwest Wireless had active and voting roles in the group. All wireless providers were invited to participate. After one year studying the wireless environment and the Denver regulations, major changes were incorporated into Denver's telecommunications ordinance.

CTIA's petition sends an ominous message, and suggests that attempts to reach out, compromise and seek workable solutions are really a waste of time. Those communities that have invested time and energy in developing code provisions to accommodate industry concerns, and that have demonstrated a track record of reasonable actions, should not be "rewarded" with the preemption of local land use authority sought by CTIA simply because some limited number of CTIA members may have had problems in a limited number of communities.

As noted in Section III.F, state law in Washington may require environmental review, including requirements for critical area studies to evaluate issues like impact to wetlands, traffic, and steep slope construction. These state requirements may be applicable even when a proposed tower is permitted as a use by right in a particular zoning district. Pierce County, Washington has developed its regulations to benefit applicants by allowing applications to be filed and consideration to begin prior to any critical area studies being submitted. Applicants may choose to wait to submit critical area studies until identified as necessary by County review staff. Admittedly, processing time is faster if all potentially required studies are submitted with the initial application. A federally imposed shot clock requiring final action by a date certain will cause the County to consider requiring all potentially applicable studies to be submitted with the

initial application. Applicants will lose flexibility and may incur additional costs, in order to afford the County additional time to conduct its application review.

E. Before the Commission imposes federal rules on local governments to spur deployment, it should consider similar requirements on providers to take prompt action to fill in coverage gaps.

Some communities, concerned with longstanding gaps in coverage, have taken steps to encourage development of new wireless communications sites. In Cherry Hills Village, Colorado, a mostly residential community, the City Council was so concerned about the problem that it adopted a resolution in 2007 promoting efforts to address the coverage gaps, and rewrote its zoning code related to wireless facilities, with significant industry input.⁶⁷ The City sent a copy of the resolution and the new code to all wireless providers in the metro area. To date, only Verizon Wireless has shown any interest in discussing sites with the City.

Arvada, Colorado tried for years to improve coverage gaps in different parts of the City. The ongoing efforts have been only sporadically successful. On a number of occasions, discussion towards new facilities would proceed, only to find that the provider shifts its focus to other communities, while the City is left waiting and citizens continue to suffer coverage gaps.

The Local Governments recognize that the Commission is not going to require wireless providers to build new facilities in specified locations, or otherwise constrain a provider's ability to pursue options for new facilities in other communities that may be less costly, or offer greater return on investment. However, the Commission must understand that many local governments have been diligently working to facilitate coverage and the roll out of new services, without much assistance from the industry. Stripping local governments of traditional land use authority is not going to fix these problems, and the Commission should not be fooled into believing that once all local governments are punished as a result of the alleged acts of a few "bad actors," all deployment problems will be eliminated.

⁶⁷ See <http://www.cherryhillsvillage.com/vertical/Sites/%7B6366E79D-859E-4D2F-8443-FF5D56A699B7%7D/uploads/%7BD33E52FB-3220-4755-ADEF-BB8E451361BC%7D.PDF>; Cherry Hills Village Municipal Code, Section 16-16-130, http://www.colocode.com/cherry/cherry_16.pdf.

F. If CTIA is serious about addressing the problems it claims exist in local government communities, it should first be required to work cooperatively with local governments with FCC assistance to address those issues, as it has done successfully in the past.

This is not the first time that the wireless industry has made claims about local government delays, and demanded preemption of local zoning authority by the Commission to “fix” the problem. These kinds of disputes have been successfully addressed in the past through cooperative discussion among the parties with Commission support in a manner that did not result in federal preemption of traditional local land use authority. In 1996, CTIA filed a petition seeking preemption of local land use authority with respect to zoning moratoria.⁶⁸ Then, as now, the industry complained of significant problems nationwide, but initially failed to name specific jurisdictions to allow those alleged bad actors an opportunity to offer their side of the story. Then, as now, local governments asserted that there was no widespread national problem that would justify the extraordinary action of federal preemption of local zoning authority. In response to local feedback, and with Commission support, the Commission’s Local and State Government Advisory Committee met numerous times with CTIA to help define the issues of concern and develop a voluntary mediation program, where representatives from both the industry and local governments would volunteer to work with specific entities that had individual problems with the impacts of a moratorium.

Those negotiations resulted in an agreement whereby the petition to preempt local land use authority was withdrawn.⁶⁹ CTIA should be commended for its past actions of working with local governments to resolve siting issues. Indeed, CTIA’s press release noting the benefits of these cooperative efforts still appears on the organization’s web site.⁷⁰

These Local Governments are disappointed, and submit that the Commission should be as well, that CTIA has chosen to forego any effort to work with the national local government associations or the Commission’s Intergovernmental Advisory Committee to resolve issues in a way that is respectful to all parties. If the Commission chooses to play any role at all in this matter, it should demand that all relevant information must be disclosed, including the names of all entities whose alleged acts support preemption. It should further demand that those named

⁶⁸ DA 96-2140

⁶⁹ <http://www.fcc.gov/state/local/agreement.html>. See also, <http://wireless.fcc.gov/siting/local-state-gov.html>.

⁷⁰ <http://www.ctia.org/media/press/body.cfm/prid/281>.

entities be given a reasonable period of time to submit their own responses. Finally, after all such submittals, the Commission should consider what percentage of the 38,967 units of local government in this nation are being accused in good faith of unreasonably delaying the deployment of wireless communications facilities. These Local Governments predict that if the Commission takes this action, the true number of “bad actors” – those that do not have a reasonable response to the allegations made against them – are significantly less than one tenth of one percent.

V. Conclusion

The Commission has no authority to act as CTIA requests. The plain language of Section 332 makes clear that siting decisions for wireless communications facilities are made by local governments in accordance with local practices. Claims that local government regulations or procedures amount to unreasonable delays or effectively prohibit services must be addressed in local courts.

To the extent that the language of the statute is not completely clear, the legislative history and the case law interpreting the statutory language further demonstrates the intent of Congress that the Commission have no role in this area. Indeed, information that the Commission provides to the public on its own website indicates an acknowledgement of this fact.

To the extent that the Commission has any statutory authority to consider the kind of role that CTIA proposes, it must recognize that land use authority is a traditional role of local government. The Commission must respect principals of federalism, and not tread on that local role, unless it can identify both clear-cut Congressional authority, together with a credible, probative and *verifiable* factual record indicating a widespread national problem which will be solved by federal preemption of long-standing local authority.

The local governments have demonstrated in these Comments that the Commission lacks statutory authority to issue the declaratory ruling requested by CTIA, and that even if it did have such authority, there is no credible, probative, and verifiable evidentiary record to support CTIA’s claims. The Petition must be denied.

Dated this 29th day of September 2008.

Respectfully submitted,

**THE GREATER METRO TELECOMMUNICATIONS
CONSORTIUM, THE RAINIER COMMUNICATIONS
COMMISSION, THE SUMMIT COUNTY
TELECOMMUNICATIONS CONSORTIUM, AND THE
CITY OF BOULDER, COLORADO**

By:



Kenneth S. Fellman

Kissinger & Fellman, P.C.

3773 Cherry Creek North Drive, Suite 900

Denver, Colorado 80209

Telephone: (303) 320-6100

Facsimile: (303) 320-6613

Email: kfellman@kandf.com

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2008, I served a true and correct copy of the foregoing **COMMENTS OF THE GREATER METRO TELECOMMUNICATIONS CONSORTIUM, THE RAINIER COMMUNICATIONS COMMISSION, THE SUMMIT COUNTY TELECOMMUNICATIONS CONSORTIUM, AND THE CITY OF BOULDER, COLORADO** addressed to the following and in the manner specified:

Michael F. Altschul
Senior Vice President and General Counsel
CTIA -The Wireless Association
1400 16th Street, NW, Suite 600
Washington, DC 20036
EMAIL: MAaltschul@ctia.org

James D. Schlichting
Acting Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
EMAIL: jim.schlichting@fcc.gov

Michael Rowan
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
EMAIL: Michael.Rowan@fcc.gov

Lani L. Williams
Local Government Lawyer's Roundtable, Inc.
N67W34380 Jorgenson Court
Oconomowoc, WI 53066-5178
EMAIL: lanil@lgl-roundtable.com

Frederick E. Ellrod III
James R. Hobson
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue N.W.
Suite 1000
Washington, DC 20036-4320
EMAIL: fellrod@millervaneaton.com; jhobson@millervaneaton.com

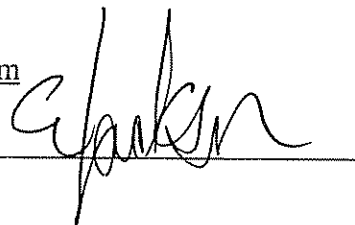
A handwritten signature in black ink, appearing to read "J. Hobson", is written over a horizontal line.

EXHIBIT A
GMTC MEMBER JURISDICTIONS

Adams County	Erie
Arapahoe County	Federal Heights
Arvada	Frederick
Aurora	Glendale
Brighton	Golden
Broomfield	Greenwood Village
Castle Rock	Jefferson County
Centennial	Lakewood
Cherry Hills Village	Littleton
Columbine Valley	Lone Tree
Commerce City	Louisville
Dacono	Northglenn
Denver	Parker
Douglas County	Sheridan
Durango	Thornton
Edgewater	Westminster
Englewood	Wheat Ridge

EXHIBIT B
RCC MEMBER JURISDICTIONS

Bonney Lake	Puyallup
Carbonado	Ruston
DuPont	Steilacoom
Fife	Sumner
Milton	Tacoma
Orting	University Place
Pierce County	Wilkeson

EXHIBIT C
LOCAL GOVERNMENTS' LAND USE CODES

Local Government	Link to Applicable Land Use Code
Adams County	http://co.adams.co.us/documents/page1planning/dev_plan/Chapter04.pdf
Arvada	http://arvada.org/docs/1169765268Telecommunications.pdf
Boulder	http://www.colocode.com/boulder2/chapter9-6.htm#section9_6_9
Breckenridge	http://www.townofbreckenridge.com/documents/page/Development%20Code%20August%2020074.pdf
Brighton	www.brightonco.gov/egov/docs/778101145296112.pdf (Section V,N)
Centennial	http://www.centennialcolorado.com ; Chapter 1, Part 4500 (City Services-Planning and Development-Land Development)
Cherry Hills Village	www.cherryhillsvillage.com ; Chapter 16 of Municipal Code (Section 16-16-130)
Denver	http://www.municode.com/resources/gateway.asp?pid=10257&sid=6
Englewood	www.engagewoodgov.org
Federal Heights	www.ci.federal-heights.co.us/content/view/87/139 (refer to Article VII, Div. 1)
Frisco	http://www.townoffrisco.com/uploadedFiles/Government/Town_Code/180z50-Telecommunication-Facilities.pdf
Jefferson County	http://jeffco.us/jeffco/planning_uploads/zoning/7.pdf
Lakewood	www.lakewood.org
Louisville	http://www.municode.com/resources/gateway.asp?pid=13149&sid=6
Thornton	http://www.municode.com/resources/gateway.asp?pid=12183&sid=6
Westminster	http://www.ci.westminster.co.us/code/892_1787.htm ; Section 11-4-11
Bonney Lake	www.codepublishing.com/wa/bonneylake ; Zoning Chapter 18.50
DuPont	http://srch.mrsc.org:8080/code/template.htm?jsessionid=3295CF4B1154BEF30A70C9F300A53FB2?view=main (DuPont Municipal Code Chapter 25.125) http://www.mrsc.org/subjects/environment/sepa.aspx (SEPA Link)
Fife	www.cityoffife.org ; See Fife Municipal Code; Zoning; Title 19.72
Pierce County	www.co.pierce.wa.us (Departments, Council, County Code and Charter, Pierce County Code, Title 18A). Code citation for wireless facilities is 18A.33.230.A - provides level descriptions called out in the zoning use tables, and 18A.35.140 - provides guidelines for the development of wireless facilities.
Steilacoom	www.ci.steilacoom.wa.us
University Place	www.CityofUP.com